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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE COLORADO INDIAN TRIBES, GILA RIVER INDIAN COMMUNITY AND SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

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CONSENT TO FILE BRIEF AMICI CURIAE

COME NOW the Colorado Indian Tribes, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community and inform the Court that pursuant to Rule 42, Supreme Court Rules, the written consent of all of the parties to this case have been presented to this Court at the same time as this brief has been filed.

I.

INTEREST OF AMICI CURIAE

The Colorado River Indian Tribes, the Gila River Indian Community and the Salt River Pima-Maricopa Indian Community are participating as amici curiae because of the substantial impact that a reversal or modification of the decisions below would have upon these Indian Tribes and their people. Each of these three Indian Tribes participating as amici curiae recognizes and asserts that the internal structure and external contact of each are different one from another, and the situation of each is significantly different from that of the Suquamish Indian Tribe. Their interests as amici curiae depend on the composition of each individual Tribe and its contact with the communities around its Reservation.

A. THE INTEREST OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

The Salt River Pima-Maricopa Indian Community is composed of Indian people who have lived in the Salt River Valley for well over 2,000 years. They trace their ancestry to the Hohokam Indians who constructed a system of irrigation canals that has been traced back to 300 B.C. In 1879 the United States set aside a Reservation for the Salt River Pima-Maricopa Indians.

The Salt River Reservation is located within the Phoenix Scottsdale metropolitan area. On the west and north is the City of Scottsdale with a population of 80,000. The Cities of Mesa and Tempe, with a combined population of 216,900, are on the southern boundary of the Salt River Pima-Maricopa Indian Community. The City of Phoenix, with a population of 679,700, lies to the west of the Reservation, 1½

miles from its boundary, beyond Scottsdale. Pima Road forms the western boundary of the Salt River Reservation and sub-division housing extends to the edge of the Scottsdale side of that road for most of the length of the Reservation's western boundary.

Major places of employment and centers of commerce daily attract residents of Mesa and Tempe across the roads that traverse the Reservation into Scottsdale and Phoenix. Attractive resorts and the cool mountains of north central Arizona are reached for many in Scottsdale and Phoenix by traveling roads through the Reservation.

The Verde River runs through the eastern part of the Reservation and its running waters and picnic grounds bring thousands from Phoenix and Scottsdale each week during the hot desert summers.

Scottsdale Community College is located just within the Reservation near its western boundary. Five thousand students attend the facility. All but one hundred and fifty are non-Indians from the neighboring Cities.

Large sand and gravel operations, located along the Reservation's southern boundary, truck their product through the Reservation to Scottsdale, Phoenix, Mesa and Tempe.

The Pima and Maricopa Indians of the Salt River Pima-Maricopa Indian Community have since 1940 governed themselves under the Indian Reorganization Act of 1934. Act of June 18, 1934, 48 Stat. 984. With little help from their trustee, they have attempted to secure for themselves the prosperity, dignity and safety that was theirs before the coming of the non-Indian. The 3,000 Indians living on the Reservation are subject to the daily pressure of the majority culture surrounding them. They have determined to govern themselves and have kept the non-Indian population to a transitory minimum.

Approximately one-half of the arable land within the Reservation is under cultivation. More than fifty percent of the cultivated land is farmed by members of the Salt River Pima-Maricopa Indian Community, with the balance leased to non-Indians by allotted land owners. Community plans call for farming operations on the balance of the arable land when the water rights of the Salt River Community are finally favorably resolved. Attempts to subdivide the land and build housing for non-Indians have been steadfastly opposed by the Indians, even in the face of significant monetary temptation. Except for some small fractionated interests acquired by inheritance from Indian spouses, no non-Indian owns any fee interest in land within the Reservation.

While it has never been possible for the Indians of the Salt River Community to ignore the non-Indian population on all of its sides, the exponential rate of non-Indian migration to the Salt River Valley has increased the problems such population brings to the predominately rural Salt River Community.

The lands of the Salt River Community have been viewed by many of the people of the neighboring Cities as a place to dump refuse, speed from one city to another, and in recent years, use marijuana and narcotics beyond the control of City or County police. In 1972, after a number of Indian children were almost run down by speeding motorists while they were awaiting their school bus, and after the Indian population became distraught over the desecration of the lands of their Reservation by motorcycles and other off-the-road vehicles, the Salt River Pima-Maricopa Indian Community Council enacted the first Community ordinances which included non-Indians within the scope of Community criminal jurisdiction. This was followed two years later by

the amendment of the Community Criminal code making the Code applicable to all persons. Prior to this reform, the Community's "Law and Order Code" defined crimes in each instance by race or ancestry: "Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault. . . ." Within their own borders, the Salt River Indians had been unable to protect their people, their property and their land from assault from the criminal elements of an ever expanding non-Indian population.

Perhaps the insult to the dignity of these people was as great as the insult by criminal activity to their persons and property. As they determined to control all criminality within their borders, both Indian and non-Indian alike, they determined to develop a system of criminal justice that would meet the highest possible standards. The Indian judges have regularly attended training sessions provided by the National American Indian Court Judges Association and held at the Arizona State University Law School. Indian police employed by the Community have attended the Police Academies of both the Federal and local governments. All of the electronic and scientific equipment used by the Police Departments of comparably sized communities are employed by the Salt River Police Department. The Salt River Pima-Maricopa Indian Community has shared with its neighboring communities in the grants of the Law Enforcement Assistance Administration. With these grants the Salt River Community has built, through its own Community-owned construction company, the most modern police station and jail in the Salt River Valley, as well as a modern court facility.

During the year 1976, 396 non-Indians went through the

Salt River Police and Court systems. Of that number, 33 were charged with drug offenses; 325 were charged with various traffic offenses including 45 charged with driving under the influence of drugs or alcohol, and the remainder were charged with other minor criminal offenses.

Before criminal jurisdiction was assumed over non-Indians, the Salt River Community was at the administrative mercy of the County Sheriff's police. Covering a large land area the elected County Sheriff had his forces thinly spread and often was unable or unwilling to involve himself within the Indian Reservation. The failure of the Sheriff to control traffic within the Reservation was the direct cause of the assumption of jurisdiction. The Federal Bureau of Investigation, with a small staff, was unable to react to the growing problems on the Reservation. The United States Attorney was always reluctant to bring before the United States District Court cases involving relatively minor offenses in the face of the Court's ever increasing caseload.

The Salt River Indians did what they had to do. They expanded their system of criminal justice so that it would encompass all who would transgress it. They expanded their system of criminal justice to safeguard their lives, their honor and their property. Not to do this would have meant their absorption into the surrounding Community, or the creation of a no-man's land of criminal activity.

B. THE INTEREST OF THE GILA RIVER INDIAN COMMUNITY

The Gila River Indian Reservation encompasses approximately 372,000 acres and is located in the south central Arizona counties of Pinal and Maricopa. The City of Phoenix is adjacent to the northwest part of the Reservation and lies

32 miles north of Sacaton, the seat of the government of the Gila River Indian Community.

The Community is inhabited by two Indian Tribes, the Pimas and Maricopas, with a total population of approximately 7,000. The Pimas have lived in the same geographical area for over two thousand years. No more than 300 non-Indians live within the external boundaries of the Reservation. Most of them are employees of the Bureau of Indian Affairs or the Indian Health Service.

The Gila River Indian Reservation straddles the main interstate highway which links Phoenix and Tucson, two of the nation's most dramatic metropolitan growth areas. Population growth has reached the Reservation boundaries on the northwest and has changed the old isolation of the Gila River Indian Reservation.

Large numbers of non-Indians cross the Reservation, work on its farms, and industrial plants, and visit its recreational areas.

The Pima and Maricopa Indians of the Gila River Indian Community have since time immemorial maintained a system of self-government. In more recent times, the Pimas and Maricopas of the Gila River Reservation have organized and incorporated as the Gila River Indian Community pursuant to the Indian Reorganization Act of 1934. Act of June 18, 1934, 48 Stat. 984. The Constitution and By-Laws were revised in 1960 and subsequently approved by the Secretary of the Interior. This Constitution enables the Community to enact ordinances which apply to Indians and non-Indians alike.

As a consequence of the close proximity to the large urban non-Indian populations, there has been an increase

of such violent crimes as assault and robbery. Such criminal activity is particularly directed at the elderly and their Social Security and rent payment checks. The prevention of such violent crimes requires law enforcement in and by the Community whose people have been placed in such jeopardy.

With increased urban growth and traffic have come the destruction and theft of natural resources. Mesquite wood, cactus and other native plants are negligently or purposely destroyed by non-Indian visitors. The Gila River Indian Community has enacted ordinances which make such activity punishable, regardless of whether the offender is Indian or non-Indian.

Trespass by persons who race motorcycles and recklessly drive dune buggies and other vehicles has resulted in vigorous enforcement of Community ordinances, which make such activity unlawful.

The flow of traffic inherent to the location of the Reservation places the requirement upon the Community to preserve order within the Community. If the Gila River Indian Community Police were restricted to regulating "Indian automobiles," traffic control would break down within the Community.

The Gila River Indian Community presently exercises jurisdiction over non-Indians who have violated the provisions of the Tribal Criminal Code. Since assuming jurisdiction over non-Indians approximately 1565 non-Indians have been processed through the Gila River Indian Community Court. All persons coming before the Court are subject to the same laws and accorded equal treatment. In any event, the Court does not have unfettered discretion and conducts itself in conformity with the Indian Civil Rights Act of 1968.

82 Stat. 77, 25 U.S.C. 1301, *et seq.* The Act affords protection in regard to the individual rights of all persons who are summoned before the Gila River Indian Community Court.

The Gila River Indian Community Court provides a quality of justice equal to any other Court in the State of Arizona of similar subject matter jurisdiction. Professional attorneys appear regularly in the Court. The proceedings are recorded and can be transcribed as the need arises. The Judges regularly attend training sessions and seminars offered by Arizona State University, the National American Indian Court Judges Association, and the State Justices of the Peace Association.

The Law Enforcement Assistance Administration has provided funds for the drafting of a revised Criminal Code and for the services of a professional prosecutor and staff. With Comprehensive Employment and Training Assistance and American Indian Lawyer Training Program funds, the Gila River Indian Community has hired para-professionals for work in the Court system.

The Community Police are as well trained and qualified as any other group of law enforcement officers in the State of Arizona. Every Officer is sent to a police academy for a 12-week course maintained by the Bureau of Indian Affairs. In-service training sessions are held periodically. All of the Community Police officers are cross deputized by both the Maricopa and the Pinal County Sheriff's Office. Community Police Officers hold federal commissions and qualify for commissions from the Arizona Department of Public Safety. Competent law enforcement personnel deal with criminal and traffic violation activity on the Gila River Indian Reservation.

The Pima and Maricopa people of the Gila River Indian

Community have historically been an agricultural people. Using their limited water resources, they have developed a substantial Tribal farm. In addition, Indian landowners have leased land to non-Indians for farming purposes. The Community had developed three industrial parks all of which have active industries located on them. Major recreation areas have been developed to the southeast of Phoenix, and a museum, arts and crafts center and restaurant lies off the main interstate highway near Sacaton. These activities constitute the on-going effort of the Gila River Indian Community to develop an economic base for the people of the Community. The economic development of the Community attracts people to the Community and requires that law and order be maintained by the Community.

The criminal ordinances of the Gila River Indian Community which apply to all persons within the territory of the Gila River Indian Reservation, recognize the basic understanding of the people of the Gila River Indian Community that all persons within the external boundaries of the Reservation ought to be dealt with by the same standard of law and protected by the same principles of justice. Within the cloak of the Indian Civil Rights Act of 1968 and the Constitution of the Gila River Indian Community, the ordinances of the Gila River Indian Community are designed to accord such fair and equal treatment to all people.

C. THE INTEREST OF THE COLORADO RIVER INDIAN RESERVATION

The Colorado River Indian Reservation is located in the lower Colorado River Basin, straddling the Colorado River, primarily in Arizona with a smaller portion of the Reservation in California. The Reservation was established by Act of

Congress (Act of March 3, 1865, 13 Stat. 541) and subsequently expanded by Executive Orders of November 22, 1873, November 16, 1874, and May 15, 1876. The Indian population of the Reservation numbers approximately 1800. Tribal members are of Mohave, Chemehuevi, Hopi and Navajo ancestry.

The bulk of the Reservation lands are devoted to agriculture and related uses. Some of the lands are farmed by a Tribal enterprise and Tribal members, with the balance leased to non-Indian farmers. The farming operations cause large, seasonal fluctuations in the farm worker population, most of the employees being non-Indian, migrant workers. The farm workers are either transported into the Reservation by the lessees during harvest season, or independently enter and leave the Reservation as the need for help arises and diminishes with the seasons.

The Colorado River, running through the Reservation, comprises a major tourist and recreation area. Fishing, boating and camping attract visitors primarily from California, and to a lesser extent, Arizona. Substantial numbers of visitors enter the recreational areas on and near the Reservation during the hot summer weekends. Weekend tourist population may exceed 20,000. The fluctuations in visitor population brings with it the usual increase in criminal activity.

Located entirely within the exterior boundaries of the Reservation is the Community of Parker with a non-Indian population of 2,000 residents. While approximately one-third of the lots within the Community are Tribally owned, the remainder are owned in fee by residents. Parker is located on the main highway within the Reservation and travel

to and from the Community and the recreation areas to the north, on and off the Reservation, proceeds across the Reservation. Substantial traffic exists between major agricultural areas in the middle and southern portions of the Reservation and Parker. Substantial traffic proceeds both in north-south and east-west directions through the Reservation.

The Colorado River Indian Tribes have been a federally recognized Tribe, and duly organized pursuant to the Indian Reorganization Act of 1934 since 1937 when its Constitution was first adopted. In 1940, it adopted its Law and Order Code, which has undergone extensive revision as late as June 1974. Under the terms of the Tribal Law and Order Code jurisdiction exists over all persons and all matters of a civil and criminal nature within the limits of the Tribal Courts, subject matter jurisdiction.

The Tribal Court has exerted jurisdiction over all individuals, Indian and non-Indian alike, since the enactment of the amended Code. Since that time, the Tribal Court has heard 6027 criminal and traffic cases. Of the total cases heard, 1794 have involved non-Indians. The Tribal traffic ordinances are in most particulars identical to the Arizona traffic code. Despite the substantial non-Indian contact with Tribal Court, there have been no petitions filed for Writs of Habeas Corpus under the Indian Civil Rights Act of 1968.

The proper functioning of the Tribal Law Enforcement system, including the Courts and Police, is principally attributable to the training provided Tribal Judges by the National American Indian Court Judges Association and the training and sophisticated equipment provided Tribal Police Officers. Both Court facilities and the jails were constructed in 1974. The jail is used to hold federal prisoners and

provides facilities superior to those of many County and local institutions. The Tribal Court maintains an independent juvenile court, with access to Community and federally funded programs for all juvenile offenders. Providing support for the Tribal judicial system is a current Law and Order Code, paralleling to a large extent the Arizona statutes. The code establishes the Tribal Court and specifies Court procedures in such matters as juries, arrest, search and seizure, presentence confinement, bail, judgment and sentencing in criminal cases, double jeopardy and speedy trial. Substantive offenses are comprehensively detailed as well. Non-Indians as well as Indians are incarcerated and are released on their own recognizance as appropriate, in accordance with uniform and usual practices.

Tribal jurisdiction has been exercised over non-Indians as a result of the necessity of the Tribe to preserve law and order within the exterior boundaries of the Reservation. Matters referred to the United States Attorneys Office, particularly if not one of the major crimes, were often held for lengthy periods of time and quite often resulted in no action at all. The press of other more important cases seemed to take precedence over the problems of law and order within the Colorado River Reservation. The County Sheriff and other law enforcement authorities have often not been able to adequately respond to non-Indian incidents within the external boundaries of the Reservation.

A Law and Order Code applicable to Indians and non-Indians alike was enacted to protect the persons and property of all people within the external boundaries of the Reservation. A unitary system of justice dealing with all individuals who transgress the law within the Reservation was determined by the people of the Colorado River Indian

Tribes to be the soundest and most efficient means to accomplish those goals. That system of law, order and justice has been and can continue to be performed with appropriate responsibility for the protection of all people within the external boundaries of the Reservation.

II.

SUMMARY OF ARGUMENT

Indian tribes are governmental units with attributes of sovereignty. As such, they may exercise subject-matter jurisdiction unless such jurisdiction has been terminated by Congress.

There has been no express or implied termination of Tribal criminal jurisdiction over non-Indians who commit crimes within the external boundaries of Indian reservations. The policy of the Indian Reorganization Act supports the view that such criminal jurisdiction does exist and must be allowed to be asserted.

III.

ARGUMENT

THE INDIAN REORGANIZATION ACT OF 1934 MANIFESTS A POLICY OF TRIBAL SOVEREIGNTY AND SELF-GOVERNMENT WHICH MUST FIND EXPRESSION IN THE ASSERTION OF CRIMINAL JURISDICTION OVER NON-INDIANS.

An Indian tribe is not merely an association of citizens. In *United States v. Mazurie*, 419 U.S. 544 (1975), this Court held that tribes are units of government, with attributes of sovereignty:

> "They are a 'separate people' possessing 'the power of regulating their internal and social relations. . . .' *United States v. Kagama*, 118 U.S. 375, 318-382 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)."

419 U.S. at 557.

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832), established the principle that tribal subject-matter jurisdiction exists unless it has been terminated by an Act of Congress. With respect to criminal jurisdiction over non-Indians, there has been no express termination. Amici submit that there has been no implied termination of criminal jurisdiction over non-Indians.[1]

The three amici Indian tribes are organized under the Indian Reorganization Act of 1934, 48 Stat. 984, *et seq.* The tribes contend that the policy and existence of the Indian Reorganization Act support the conclusion that Indian Tribes have the right to assert criminal jurisdiction over non-Indians who commit criminal acts while within the external boundaries of a Reservation.

48 Stat. 987 reads as follows:

> "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a

[1]The opinion below of the Ninth Circuit Court of Appeals, reported as *Oliphant v. Schlie* at 544 F.2d 1007 (9th Cir. 1976), discussed termination by implication of three statutes: 18 U.S.C. § 1152 (which extends federal criminal jurisdiction into "Indian country"); 25 U.S.C. § 1302 (the Indian Civil Rights Act of 1968); and 25 U.S.C. § 1321 (Public Law 280, permitting a state to exercise criminal jurisdiction in Indian country with consent of the affected tribe.)

These amici have nothing to add to the arguments which have been made concerning termination by implication. Rather amici wish only to discuss criminal jurisdiction in the context of the Indian Reorganization Act.

majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress."

The purpose of the Act was to restore integrity to the process of Indian self-government. It could not be seriously argued that Indian tribes were to be encouraged to adopt constitutions and by-laws which were of no effect; if Indian tribes were to reestablish themselves as sovereign entities, they must have been intended to assert their sovereignty in the fullest traditional sense. The Act would be a charade if either less were intended, or less were allowed.

The construction of the Act by this Court reflects this same perception of the Act and its purpose. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973), the

Court said:

> "Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe."

A similar view was espoused in *Fisher v. District Court of 16th Judicial District of Montana*, 424 U.S. 382 at 387, *reh. denied*, 425 U.S. 926 (1976), where the Act was described as "a statute specifically intended to encourage Indian tribes to revitalize their self-government."

To permit Indian tribes to assert their criminal jurisdiction—a jurisdiction which would reflect and follow the same constitutional safeguards required to be observed off the reservation—over non-Indians, would not be contrary to any federal policy: there has been no suggestion that the criminal activities which form the basis of the tribes' criminal jurisdiction would not be crimes off the reservation. Quite the opposite would be true. The assertion of criminal Jurisdiction would promote federal policy with regard to Indian sovereignty and self-government, as that policy is manifested in the Indian Reorganization Act of 1934.

IV.

CONCLUSION

The decisions below preserve for Indian Tribes their ability to sustain viable self-government through legal systems which apply to all people within the territorial jurisdiction of the Tribes. Justice and the practical affairs of men require

an equal system of justice within any territorial jurisdiction. The future of Indian self-government requires that the decision of the Ninth Circuit be affirmed.

We respectfully submit that the Ninth Circuit decision should be affirmed.

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